IN THE

# Supreme Court of the United States

October Term, 1978

No. 77-1343

JOHN HARKINS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, PA 15219
(412) 355-0650

Attorney for Petitioner

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on February 22, 1978.

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## CITATIONS TO OPINIONS BELOW

The judgment order of the Court of Appeals is not yet reported and is reprinted in Appendix A, *infra*.

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## JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

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## QUESTIONS PRESENTED

1. Should Petitioner's sentence be vacated and the case remanded to the court below for resentencing because the trial court did not state its reasons for the particular sentence imposed?

2. Did the government fail to prove that the gambling business had a gross revenue of $2,000.00 on any single day?

3. In determining whether the government's application for the interception of wire communications establishes the need for interception required by 18 U.S.C. 2518(1)(c), may the court consider affidavits submitted in connection with a previous application?

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## STATUTES INVOLVED

The statutory provisions involved, 18 U.S.C. §1955, 18 U.S.C. §2518(1)(c) and (3)(c), are set forth in Appendix B, *infra*.

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## STATEMENT OF THE CASE

On June 13, 1975, the Federal Bureau of Investigation began court-authorized interception of incoming and outgoing telephone calls over four telephones located in the United States Post Office in downtown Pittsburgh, Pennsylvania, and two telephones located in private residences. One of those two telephones was located in co-defendant Joseph Iannelli's home.

On July 23, 1975, the Federal Bureau of Investigation began court-authorized interception of incoming

and outgoing telephone calls over two telephones located in the residence of Petitioner.

On February 10, 1977, the Petitioner and eleven other individuals were indicted and charged in two counts with operating a sports gambling business in violation of 18 U.S.C. §1955 and §371.

On May 9, 1977, after extensive pre-trial proceedings, the case came on for trial before Chief District Judge Gerald J. Weber and a jury. Immediately prior to trial, the government dismissed the charges against defendants John Deep and Charles Jules Kelly. Defendant Theodore Michenzi entered a guilty plea to Count Two.

The government's entire case was based upon the evidence disclosed by the court-authorized interceptions. That evidence was interpreted for the jury by FBI Agent William Holmes, a purported gambling expert.

At the close of the government's case, a judgment of acquittal was granted as to defendant Louis Ciancutti. The defendants then presented the testimony of Sherman Goldman, a Chicago bookmaker who had reviewed the intercepted phone conversations relied upon by the government. It was his opinion that the government's evidence showed that only four of the defendants (Harkins, the Iannellis and Gnazzo) were engaged in the gambling business charged in the indictment (500a).

On May 26, 1977, the jury returned verdicts of guilty as to all remaining defendants except William Tyce McCullough. McCullough was acquitted on both counts. On July 8, 1977, the Petitioner was sentenced to four years imprisonment and a $5,000.00 committed fine.

A more detailed statement of the facts, as they are relevant, are discussed below.

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## REASONS FOR GRANTING THE WRIT

**1. Petitioner contends here, as he did in the Circuit Court, that his sentence should be vacated and the case remanded to the court below for resentencing because the trial court did not state its reasons for the particular sentence imposed.**

Petitioner was convicted of operating a sports wagering business in violation of 18 U.S.C. §1955 and §371. He contends that his sentence should be vacated and the case remanded because the trial judge did not state his reasons for the sentence imposed.

Prior to sentencing, the trial judge requested and received a pre-sentence report. Counsel was permitted to review the report; however, counsel was never shown nor made aware of the recommendation.

At sentencing, Petitioner's counsel requested that the Court consider probation (719a). The record shows that at the time of sentencing, Petitioner was twenty-nine years of age, had no prior criminal convictions, was a high school graduate, had served in the Army from 1968 to 1970, and received an honorable discharge (719a). Petitioner was employed as a clothing salesman from 1965 to 1974, with the exception of his years in the military service (721a), and had an offer of employment (721a) which he was reluctant to accept pending the outcome of his sentencing (722a).

Finally, it was noted that for the years 1974, 1975 and 1976, Petitioner's income tax returns reflected that he earned his income as a professional gambler (721a). Petitioner produced those income tax returns at the request of the probation office (721a).

The trial court's only indication of its reasons for the severity of Petitioner's sentence is contained in the following exchange:

> "*The Court*: Well, Mr. Levenson, of the people in this organization on trial in this particular indictment, Mr. Harkins was the leading figure. Everything headed up to him. Everybody else has some semblance of employment, generally.
>
> But he left any regular employment in '74 to devote himself full time to this. I presume that it is true that you are a nephew of the Iannellis?[1]
>
> "*Mr. Levenson*: That is true.
>
> "*The Court*: Yes, I only call that to attention, not for any purpose of punishment by that relationship, but to know that he entered into this with his eyes open. He knew what the consequences of this type of activity could be. And so I place him in a different category from these minor persons who—well, they have been a gambler, but they have some other occupation. They are compulsive gamblers, or the like." (722a).

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1. Petitioner is the nephew of co-defendants Joseph and Norma Iannelli and is also the nephew of Robert E. Iannelli who has two gambling convictions in the court below.

*Reasons for Granting the Writ.*

## A. All Criminal Sentences Should Reflect an Individualized Judgment Rooted in the Facts of Each Case.

This Court has approved a policy requiring that sentences be tailored to fit the offender. *Williams v. New York,* 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); *Williams v. Oklahoma,* 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed.2d 516 (1959). This philosophy of individual sentencing necessarily grants broad discretion to the trial judge who must determine which among the sentencing alternatives and range of permissible penalties is the proper sentence to be imposed. The exercise of this discretion which is almost totally unlimited, unstructured and unreviewable, is one of the most important and most easily abused powers possessed by the trial court.

The sentencing decision is of enormous consequence and although the trial judge is vested with wide discretion, he may not ignore sentencing guidelines established by this Court, nor is he free to ignore the Petitioner's constitutional rights.

It appears from the record that Petitioner's sentence may have been excessive and that the trial judge may have ignored this Court's policy in favor of "individualizing sentences". The problem is that the trial court did not state its reasons for the imposition of the sentence, and therefore meaningful review of the sentence is not possible on the present state of the record.[2]

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2. It has been recognized by commentators that one of the reasons that appellate courts have been reluctant to review sentences is that the appellate courts do not have access to a meaningful record. See, e.g., Note, Appellate Review of Sentences and the Need for a Reviewable Record, 1973 Duke L.J. 1357 (1973).

Requiring the sentencing judge to state his reasons for the imposition of a sentence will help rationalize the sentencing process and will assure a basis for meaningful appellate review.

### B. Appellate Courts do Have the Authority to Review Sentences.

While federal courts have uniformly acknowledged that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review", see, e.g., *Gore v U. S.*, 357 U.S. 386, 393 S. Ct. 1280, 2 L. Ed.2d 1405 (1958), appellate courts have had no trouble finding that they do have the authority to review when they are inclined to.

Several cases have suggested that statutory authority to review sentences does exist under 28 U.S.C. §2106. See, e.g., *U. S. v. Rosenberg,* 195 F.2d 583, 604-607 (2nd. Cir.). Other appellate courts have indicated that where a trial judge plainly abused his discretion, the Court has the power to review the sentence without any reference to statutory authority. See, e.g., *U. S. v. Hetherington,* 279 F.2d 792 (7th Cir.); *Livers v. U. S.*, 185 F.2d 807 (6th Cir.). The Second Circuit has examined what it has termed the "integrity" of the sentencing process, *McGee v. U. S.*, 465 F.2d 357 (1972), and the First Circuit has expressed some dissatisfaction with the severity of a selective service sentence. *U. S. v. Walker,* 469 F.2d 1377 (1972). Sentences within the statutory maximum have been reviewed and vacated by the Sixth and Seventh Circuits. *U. S. v. McKinney,* 466 F.2d 1403 (6th Cir., 1972); *U. S. v. Charles,* 460 F.2d 1093 (6th Cir., 1972); *U. S. v. Wiley,* 278 F.2d 500 (7th Cir., 1960).

Finally, Supreme Court support for the proposition that federal appellate courts generally may not review a sentence is pure dicta, 2 C. Wright, *Federal Practice and Procedure,* §533 at 451-452 (1969). In spite of its own language to the contrary, in cases such as *Blockburger v. U. S.,* 299 S. Ct. 180, 76 L. Ed. 306 (1932), this Court, in *Yates v. U. S.,* 356 U.S. 363, 78 S. Ct. 766, 2 L. Ed.2d 837 (1958), not only reviewed the severity of a sentence, but also set it aside and substituted its own sentence.

More than a decade ago, it was reported by the judicial conference that the judges of the Second and Third Circuits "overwhelmingly favor some method of reviewing sentences". 1964 Report of Judicial Conference (1965) 86. Appellate review of sentences was advocated by the President's Crime Commission which stressed the importance of this practice as affording "the occasion for a systematic and continuous examination of sentencing policy by an appellate court". The Challenge of Crime in a Free Society (GPO 1967) 145. The Commission added:

> "Appellate review would encourage the development of uniform and considered sentencing policies within a jurisdiction. It leads both the trial court and the appellate court to give sustained and explicit consideration to the justification for particular sentences. It provides a workable means of correcting unjust and ill-considered sentences, particularly those in which the punishment imposed is grossly inappropriate." Id. at 145-146.

It has also been noted that "at this stage of our history, with wide-spread public hysteria regarding control of crime, accompanied by scapegoating of the judi-

ciary for permitting escapes from punishment, the institution of appellate review of sentences could serve to remove one of the sources of antagonism." Cipes, *Moore's Federal Practice,* Vol. 8, §32, p. 127-129.

### C. There Are Substantial Benefits in Requiring the Trial Court to State Its Reasons for the Imposition of Sentence.

These benefits have been ably summarized by the Second Circuit in *U. S. v. Brown,* 479 F.2d 1170, 1172-1173 (1973):

> "[It] would be a 'powerful safeguard against rash and arbitrary decisions' at the crucial stage of the criminal process where the defendant's liberty is at stake. M. Frankel, Criminal Sentences—Law Without Order 41 (Hill and Wang 1972). It would serve 'to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and, finally, to make him show that these necessities have been served.' Id. at 40. It would also promote fairness by minimizing the risk that the sentencing court might rely on misinformation or on inaccuracies in the presentence report. *See, United States v. Needles,* 472 F.2d 652 (2nd Cir., 1973). If a misapprehension on the court's part occurs, the defendant and his counsel would then have the opportunity to answer and explain, pointing out the error. A sphinx-like silence on the court's part precludes anyone (including the parties, the judge and an appellate tribunal) from learning whether he acted in error. Furthermore, a statement of reasons by the court could prove to be of considerable assistance to prison and parole

> authorities in later determining the type of institution in which the defendant should be incarcerated and the time and conditions of parole."

The requirement of a statement of reasons might also help bring more uniformity of sentences. Disparity in sentencing is one of the most criticized aspects of the sentencing process. Requiring the trial judge to articulate his reasons for imposing a particular sentence could help to eliminate that problem. Coburn, *Disparity in Sentences and Appellate Review of Sentencing,* 25 Rutgers L. Rev. 207 (1971).

In 1971, the Wisconsin Supreme Court, in *McCleary v. State,* 49 Wis.2d 263, 280, 182 N.W.2d 512, 521. adopted the requirement that at the time sentence is imposed, the court must articulate its reasons for that sentence:

> "In all Anglo-American jurisprudence, a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined. It is thus apparent that requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed."

"(W)e apply (the requirement that decisions be justified) . . . to affairs of clearly less consequence, yet we place no burden of explanation upon the judge who decides that the defendant before him must be locked up for ten years, rather than five or one." Note, Appellate Review of Sentences and the Need for a Reviewable Record, 1973 Duke L.J. 1357, 1375 (1973).

Recently, the Pennsylvania Supreme Court, in *Commonwealth v. Riggins,* 377 A.2d 140, 149 (1977), imposed upon the trial courts the requirement that it state its reasons for the particular sentence imposed:

> "After evaluating the various arguments, we are persuaded that the sentencing process will be improved by requiring a trial court to state, on the record, the reasons for the sentence imposed."

Finally, it should be noted that in those jurisdictions which permit appellate review of sentences, the "availability of sentence review has actually precipitated a general *decrease* in the number of *overall* appeals in criminal cases." Coburn, *Disparity in Sentences and Appellate Review of Sentencing, supra,* at 218 (1971). (Emphasis in original).

### D. Application of These Sentencing Principles to This Case.

Nationally, sixty-seven percent (*67%*) of all individuals convicted of the offense that the Petitioner was convicted of received a sentence of probation. The figure is sixty-one percent (*61%*) for the District Court in which the case was tried (706a). Nonetheless, *none* of the defendants in this case received a probationary sentence. It appears from the following remarks of the trial judge at the time of sentencing that he may have ignored this Court's policy in favor of "individualizing sentences" because of his *general* view of organized gambling:

> "When you read the legislative history of the Act and the pernicious influence of organized gambling here, you'll see why Congress was so intent on this,

and you'll see why the government went after these people . . ." (676-677a)

* * *

"It's not an innocent little game. It's a dirty, vicious business." (680a)

* * *

". . . We have got to impress you and other people that the government is serious about the organized gambling business." (683a)

The court's remarks were totally inappropriate. The evidence showed nothing more than a gambling business. While that business operated in violation of federal law, it is important to remember that the crime here was victimless. In fact, it's hard to conceive that this business could have flourished were it not providing a service desired by the public. That same service, it should be noted, is also now provided by Pennsylvania and numerous other states.

This was not a gambling business which engaged in acts of official corruption or used strong-arm methods to collect its debts. Nor was it shown, despite approximately forty days of wiretapping, that any of the defendants engaged in any other type of criminal activity. Thus, while it is certainly conceivable that some gambling organizations may exert a "pernicious influence" and may be a "dirty, vicious business", such was clearly *not* the case here.

Additionally, the Petitioner's prison sentence of four years appears to be excessive, disproportionate to the crime proven and not tailored to fit the individual.

However, without knowledge of the court's reasons for imposing the sentence it did, meaningful appellate

review is not possible. We, therefore, request this Court to vacate the sentence and remand the case to the trial court for resentencing with directions that the trial court state its reasons for the particular sentence imposed.

**2. The government failed to prove that the gambling business had a gross revenue of $2,000.00 on any single day.**

The indictment alleged that Petitioner was involved in an illegal gambling business which had a "gross revenue of $2,000.00 or more on one or more single days" in violation of 18 U.S.C. §1955. Petitioner contends that the government failed to prove this specific allegation and that the evidence is therefore insufficient to sustain the conviction.[3]

It is beyond dispute that "... [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). Here, it is Petitioner's position that he was convicted of the offenses alleged in the indictment without such proof.

In an attempt to show that the alleged gambling business had a gross revenue of $2,000.00 or more, the government introduced evidence derived from the monitored telephone conversations. FBI Agent William L. Holmes, who testified for the government as an expert

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3. The sufficiency of the evidence was challenged by motions for judgment of acquittal made after the close of the government's case and after the close of all testimony.

in gambling, analyzed these conservations and determined the amounts of money wagered by bettors over the Iannelli and Harkins telephones on two specific days. His testimony was as follows:

"Q: Now with regard to the first series of monitored conversations, those dealing with the Iannelli telephone, telephone number—area code 412—766-0714, did you analyze off of those monitored conversations one day's worth of wagers, and were you able to determine what the amounts wagered were?

"A: Yes, sir.

"Q: Would you detail now the day that you analyzed and the amounts wagered on that day?

"A: On 6/23, 1975, the total amount wagered was $13,673.00.

"Q: On the Iannelli telephone?

"A: Yes, sir.

"Q: Now with respect to the total wagers accepted during a one-day period on the two telephones being operated by John Harkins, Hymie, telephone numbers—area code 412—931-0575 and area code 412—931-0384, did you analyze one day off of those two telephones?

"A: Yes, sir.

"Q: And which day was that?

"A: On 7/26, 1975.

"Q: And as a result of that analysis, were you able to determine the amount wagered for that one-day period off of those two telephones?

"A: Yes, sir, I did.

"Q: And what amount was that,

"A: $62,920.00."

(225a-226a)

This testimony was insufficient to prove that the gambling business had a "gross revenue of $2,000.00 or more on one or more single days". It is our position that "amounts wagered" is not the correct measure of "gross revenue".

In *United States v. Ceraso,* 467 F. 2d 653 (3rd Cir., 1972), the defendant claimed that "gross revenue" was "net profit". The Court rejected that claim, pointing to the inordinate burden that such a construction would place on the government; the bookmaker's "carefully secreted" records would have to be introduced to prove his expenses. 467 F.2d 657. We agree that "gross revenue" is not "net profit", but gross revenue is also *not* "total amount wagered".

Revenue means income; gross revenue is total income before expenses.[4] Gross revenue cannot be simply the amount wagered because there may not be any income derived from the wager itself. When Congress enacted §1955 and thereby asserted its power to regulate gambling, it did so on the premise that the money derived therefrom flows in interstate commerce. See, 84 Stat. 936; and Remarks of Senator Hruska, 115 Cong. Rec. 10736 (1969) quoted in *United States v. Ceraso, supra,* at 657. In the case of sports betting, no money changes hands, no obligation to pay occurs, until the completion of the particular sporting event on which the wager has been made. Gross revenue is the total amount won and can be easily computed by comparing the wagers made with the scores of the games. This imposes no extraordinary or unreasonable burden upon the gov-

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4. *Black's Law Dictionary,* 1482 (4th Ed. Rev. 1968); *The Random House College Dictionary,* 1129 (Rev. Ed. 1975).

ernment, and there are no "carefully secreted records" necessary. The government need only look at a newspaper to find which games the bookmaker won and which ones he lost.

This principle is best illustrated by a review of a portion of the cross-examination of the government expert concerning a telephone conversation on June 20, 1975, at 7:31 P.M. between defendants Gnazzo and Iannelli during which Gnazzo is placing bets with Iannelli (384a). Each bet is explained as to the amount wagered, the type of bet and the team picked to win. The witness testified that the bets made during this conversation were representative of typical sports bookmaking activity with regard to baseball. He testified that the following elements, among others, were critical to a sports bookmaking operation: line information, credit, the occurrence of the sporting event and the final score of the event. In addition, in baseball, if a specific pitcher does not pitch the game bet on, the bet is cancelled. Likewise, if the game is not played or terminates before eight innings elapse, then the bet is cancelled (182a).[5] The witness further explained that it is necessary for the bookmaker to know who won and who lost in order to determine whether he profits from a bet. The witness was then shown a portion of a newspaper dated June 21, 1975, which listed the scores from the baseball games played on June 20, 1975 (defendants' Exhibit F). Referring to each of the bets placed during the Gnazzo-Iannelli conversation, the witness determined from the scores that the bookmaker lost each bet. Consequently, it is submitted that the bookmaker had no income whatsoever from those bets.

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5. See, also, the testimony of defendants' expert witness at 589a.

The Court in *Ceraso* believed the legislative history of §1955 indicated that Congress intended "gross revenue" to mean "amount wagered". Senator Hruska was quoted:

> "Any *bookmaking or numbers operation which does more than $2,000,00 in business in one day* . . . must have a substantial adverse effect in the flow of moneys and goods in interstate commerce. (Emphasis by the Court) 115 Cong. Rec. 10736 (1969)" 467 F.2d 657.

However, the "flow of moneys and goods in interstate commerce" cannot be affected until the bookmaker receives money. Furthermore, the scant language "doing more than $2,000.00 in business in one day" can hardly be considered clear evidence of Congressional intent. True, it does seem to rule out an interpretation of "gross revenue" as "profits", but it offers no support for the "amount wagered" interpretation either. If anything, it supports Petitioner's claim that "gross revenue" is winnings, i.e., money paid or owed to the bookmaker.[6]

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6. Additional support for Petitioner's view of the legislative intent can be found in the "Statement of Findings and Purpose" which serves as the preamble to the "Organized Crime Control Act of 1970":

> "The Congress finds that: (1) organized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes . . ." §1 of Public Law 91-452.

A sports bookmaker is owed nothing, and he owes nothing at the time a wager is made. Whether the bookmaker wins or loses cannot be determined until the final outcome of the particular sports contests.

Congress can, and in other instances has, used specific, unequivocal language to refer to the total amount wagered. 26 U.S.C. §4401, for example, states:

> "There shall be imposed on wagers . . . an excise tax equal to two percent of the amount thereof."

The tax is clearly levied against the amount wagered. On the other hand, §1955 requires as an element of an illegal gambling business "a gross revenue of $2,000.00 in any single day". If Congress had meant the $2,000.00 figure to represent "total amount wagered", it could have so provided. Instead, it chose to refer to "gross revenue".

Here, the government failed to prove that the gambling business had a "gross revenue" of $2,000.00 or more on any one day. The government can only point to the amount of money wagered which cannot constitute

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The "activity that annually drains billions of dollars from America's economy" cannot be the mere placing of wagers. A wager itself does not have any relation to "money obtained", nor does it, without more, produce money so "used". The above-recited Congressional findings presuppose the actual flow or exchange of moneys such that the interstate commerce power is triggered. However, the mere placing of a wager does not necessarily result in any flow or exchange of moneys.

"gross revenue".[7] Accordingly, the Petitioner's conviction is based upon insufficient evidence and must be reversed.

**3. In determining whether the government's application for the interception of wire communications establishes the need for interception required by 18 U.S.C. 2518(1)(c), the court may not consider affidavits submitted in connection with a previous application.**

In this case, there were two wiretap applications. The first was submitted on June 13, 1975 and incorporated affidavits of FBI Agent William Paul Corvin and Postal Inspector Nicholas Cook. The second application was submitted on July 23, 1975 and incorporated the affidavit of FBI Agent Thomas J. Coyle. In addition, that application also incorporated the June 13 affidavits of Corvin and Cook.

The court's consideration of the June 13 affidavits in connection with the July 23 application was clearly erroneous. Since the Coyle affidavit alone did not establish the need for interception required by 18 U.S.C.

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7. Because of this argument, Petitioner also maintains that the court's instruction to the jury on the gross revenue requirement was erroneous. The court stated:

> "For example, the requirement of $2,000.00. You should consider the amount of the total wagers accepted in any one day, regardless of how the balance sheet came out at the end of the day, or regardless of whether the games were actually played or not, but the total amounts actually booked or registered determines that, and you have heard the evidence as to the amount of that." (645a)

See, also, p. 625 of the judge's charge. An objection to this instruction was raised below and overruled. (661a)

2518(1)(c), all of the evidence seized pursuant to the July 23 application should have been suppressed.

The standard which must be met in establishing the need for interception is set forth in §2518(1)(c), which requires that each application must include:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The standard is further reflected in §2518(3)(c), which provides that in issuing the order, the judge shall determine whether:

> "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Through this section, the government is thus required to make some preliminary assurance that electronic surveillance will be used only in such instances where other methods of investigation have failed or, for reasons which are specified and reasonable, are likely to fail. The Third Circuit Court of Appeals stated its understanding of this requirement as follows:

> "Congress has established this additional precondition to obtaining a §2518 authorization in order to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures (are) not to be routinely employed as the initial step in criminal investigations. '(W)iretapping is not (to be) resorted to in situations where traditional investigative techniques suffice to expose

the crime.'" *United States v. Vento,* 533 F.2d 838, 849 (CA3, 1976).

### A. The Coyle Affidavit Alone Is Not Sufficient to Show the Government's Compliance With §2518(1)(c).

In relevant part, that affidavit sets forth:

"My experience, and the experience of other Special Agents of the Federal Bureau of Investigation, who have conducted investigations of illegal gambling operations and with whom affiant has consulted, has shown that gambling raids and searches of gamblers in their gambling establishment have not, in the past, resulted in the gathering of sufficient physical or other evidence to prove all elements of the offenses they have committed. Through my experience and the experience of other Special Agents who have worked on gambling cases, I have found that gamblers frequently do not keep complete records and if such records are maintained, gamblers immediately prior to or during a physical search frequently destroy these records by dissolving them in water or by burning such records with specially designed flash paper. Additionally, records that have been seized in past gambling cases have generally been insufficient to establish the involvement of all the conspirators in the offense, the periods of operation which the seized records reflect, the gross amount of wagers accepted in a single day (because such records are difficult to interpret), the arrangements for payoffs for winning bets, and the methods of transfers in payments for receipt of gambling information." Coyle Affidavit, 27a-28a.

The Coyle affidavit thus confines itself to a discussion of *one* investigative technique—search and seizure. Moreover, the discussion is limited to "prior agent experience" and contains no facts which would enable the district judge, apart from the agent's experiences, to make an independent determination.

The affidavit does not reveal whether or not any other investigative procedures have been tried or even contemplated, much less an explanation "why normal investigative procedures have been tried and have failed and reasonably appear unlikely to succeed if continued". There is no discussion of surveillance, undercover operations or the use of live witnesses.

Agent Coyle states: ". . . surveillance, undercover operations and other means cannot disclose what is said over the telephones—the means by which this illegal gambling business carries on its day-to-day operation." Coyle affidavit, 77a. In essence, the government is asserting that the use of wiretaps is easier than other investigative techniques since the gambling organization conducts its business by telephone. While this may be true, it alone cannot serve to discharge the requirement of §2518(1)(c).

> "It is no doubt true that experienced agents at the outset of an investigation can anticipate with a fair degree of accuracy whether ordinary techniques will fail or prove to be 'too dangerous'. To delay the wiretap order while ordinary techniques are employed or to undertake to educate a district judge to enable him to appreciate their level of experience no doubt appears to such agents to be a waste of time and resources. Their perception may be accurate, but Congress has deprived it of deci-

sive influence. The particularized showing here described is necessary. The district judge, not the agents, must determine whether the command of Congress has been obeyed." *U. S. v. Spagnuolo,* 549 F.2d 705, 710-711 (CA9, 1977)

It is clear that the Coyle affidavit standing alone is insufficient to support the need for interception required by §2518(1)(c).

### B. The Previous Affidavits May Not Be Used in Support of the Present Application.

Of significance is the fact that the June 13 application sought to intercept telephone communications between entirely different individuals and over entirely different telephones than the July 23 application.[8] Therefore, the June 13 affidavits do not deal at all with the targets of the July 23 application—Cammarata and Harkins. The previous affidavits, in terms of §2518(1)(c), have no factual relation to Cammarata and Harkins. The most that can be said of the prior affidavits, in terms of the present application, is that they relate to the court the general experience of agents in conducting prior gambling investigations.

This issue arose in *Calhoun v. Maryland,* 367 A.2d 40 (1977).[9] In holding that a valid prior affidavit could

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8. The June 13 application sought an Order to intercept the wire communications of Sidney J. Elcock, Evans Howard, Harry Zelkowitz, Louis J. Kolarich and Joseph Iannelli at four separate telephones located in the post office in addition to the home phones of Iannelli and Elcock. The July 23 application sought an Order to intercept the wire communications of James Cammarata and Petitioner at telephones located in their residence.

9. While *Calhoun* is a state court decision, it is of precedential value because while the Act allows for con-

not be used to cure a present defective affidavit, the court stated:

> "What the state, in the instant case, did was to make an application supported by a valid affidavit and obtain an order thereon for a location on East Baltimore Street. Thereafter, it sought a new order for a location on McClean Boulevard, and in the affidavit in support thereof, attempted to fuse the allegations of the first affidavit, that normal investigative procedures would not be successful, by incorporating the prior affidavit by reference. If such a procedure were allowed, it is possible that the police could obtain a valid order based on a legally sufficient affidavit and then in a whole series of new applications incorporate the prior affidavit by reference so as to comply superficially with 18 USC §1528." *Calhoun v. Maryland, supra,* at pp. 45-46.

The consideration of the June 13 affidavits was a flagrant violation of the statute, which requires strict adherence to its procedural steps, *U. S. v. Giordano,* 416 U.S. 505 (1974), and to Fourth Amendment precepts in general.

A better case for consideration of the June 13 affidavits could be made if those affidavits dealt at all with the targets of the July 23 application. However, since they did not, the affidavits were totally irrelevant and should not have been considered by the court.

Because the Coyle affidavit alone is insufficient to comply with §2518(1)(c), the court below erred in refusing Petitioner's motion to suppress evidence.

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current state regulation, any such state statute is subject, at a minimum, to the requirements of the federal Act. 18 U.S.C. §2516(2).

## CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point because this Court, in the exercise of its supervisory powers, should require a statement of reasons for the particular sentence imposed. Such a requirement will facilitate appellate review of sentences, will be a safeguard against rash and arbitrary sentencing decisions, will promote fairness and help bring about greater uniformity of sentences.

As to point two, certiorari should be granted because the federal district and appellate courts are interpreting the term "gross revenue" in a manner inconsistent with the statute. While "gross revenue" is not "net profit", it is also not "total amount wagered". The "total amount wagered" definition is clearly erroneous and should be corrected by this Court.

As to point three, the Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call an exercise of this Court's power of supervision.

Respectfully submitted,

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, PA 15219
(412) 355-0650

Attorney for Petitioner

# APPENDIX

*Appendix A.*

## APPENDIX A

No. 77-2009

UNITED STATES OF AMERICA
v.
HARKINS, JOHN a/k/a Hymie a/k/a HYM
John J. Harkins, Appellant.
(Criminal No. 77-28-5, W.D. of Pa.)
Submitted Under Third Circuit Rule 12(6)
February 15, 1978

Before SEITZ, *Chief Judge,* ROSENN and GARTH, *Circuit Judges.*

### Judgment Order

After considering the contentions raised by the appellants, to-wit, (1) that the district court erred in refusing the defendants' motions to suppress evidence obtained through the interception of wire communications; (2) that the evidence pertaining to defendant Jean Liebert was insufficient to sustain her conviction since the government failed to prove that there was an exchange of lay-off wagers and other gambling information between Liebert and the Harkins-Iannelli business; (3) that the district court erred in instructing the jury that it may convict a person of violating §1955 if it finds that an independent bookmaker places or accepts lay-off wagers from another independent bookmaker; (4) that the evidence was insufficient to sustain the conviction as to defendants in that the government failed to prove the gambling business had a gross revenue of

$2,000.00 on any single day as alleged in the indictment; and (5) that appellants' sentences should be vacated and the case remanded to the district court for resentencing because the district court did not state its reasons for the particular sentences imposed; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ SEITZ
Chief Judge

Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

DATED: F'eb 22 1978

## APPENDIX B

18 U.S.C. §1955:

§1955. PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling

business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross re-

ceipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L 91–452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

18 U.S.C. §2518(1)(c) and (3)(c):

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon the oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception or wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

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